(3)

No. 04-53 MAY 8 2004

IN THE SUPREME COURT OF THE UNITED STATES

HARRY BUTRY, JR.,

Petitioner

vs.

SUPERINTENDANT SCI-COAL TOWNSHIP, Superintendant at SCI-Coal Township; LUZERNE COUNTY, District Attorney, ATTORNEY GENERAL,

Respondents

On Petition for Writ of Certiorari To The U. S. Court of Appeals for the Third Circuit

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APPENDIX - VOLUME 2

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IN THE SUPREME COURT OF

PENNSYLVANIA

MIDDLE DISTRICT

COMMONWEALTH : No. 036 M.D.

OF PENNSYLVANIA : Allocatur Docket

: 2000

v. :

:

HARRY BUTRY, JR., :

Petitioner :

ORDER

PER CURIAM:

AND NOW, this 18th day of May 2000, the petition for allowance of appeal is denied.

IN THE SUPERIOR COURT OF

PENNSYLVANIA

COMMONWEALTH :

OF PENNSYLVANIA :

:

v. :

:

HARRY BUTRY, JR., : No. 1305 Harrisburg

APPELLANT : 1998

ORDER OF COURT

The Court hereby DENIES the application filed October 29, 1999 requesting reargument or reconsideration of the decision dated October 15, 1999.

PER CURIAM

DATE: December 20, 1999

IN THE SUPERIOR COURT OF

PENNSYLVANIA

COMMONWEALTH :

OF PENNSYLVANIA :

:

v. :

:

HARRY BUTRY, JR., : No. 1305 Harrisburg

APPELLANT : 1998

Appeal from the Judgment of Sentence entered on March 20, 1998, in the Court of Common Pleas of Luzerne County, Criminal No. 2981 of 1997

BEFORE: EAKIN, JOYCE and HESTER, JJ

MEMORANDUM:

Harry Butry, Jr. appeals from the judgment of sentence of life imprisonment imposed following his conviction of first degree murder, We affirm.

In early July, 1997, Tina Marcario, the

victim, moved out of an apartment she had shared with appellant. Marcario and appellant had two children together. Appellant had attempted to kill himself on several occasions and prior to the murder, he had repeatedly threatened to carry out his suicide. Just prior to the shooting, appellant obtained access to the murder weapon, a gun, which he had applied for a few weeks earlier. On August 21, 1997, appellant shot Marcario five times in a parking lot of a personal care facility following a verbal argument. On January 16, 1998, a jury convicted appellant appellant of first degree murder. Following the imposition of sentence and the denial of his post-sentence motions, appellant filed this timely appeal. Appellant raises the following issues: 1) whether trial counsel was ineffective for failing to properly investigate, prepare and present a diminished capacity defense; 2)

whether trial counsel was ineffective for failing to present evidence of appellant's suicidal tendencies; 3) whether trial counsel was ineffective for failing to present evidence appellant had access to other firearms in August 1997; 4) whether trial counsel was ineffective for failing to move for a mistrial due to interaction between a juror and the victim's sister; and 5) whether the trial court abused its discretion by denying appellant's motion for a mistrial based on a juror's observation of him in custody during trial, absent a *voir dire* examination of the juror.

Appellant's first four issues challenge trial counsel's effectiveness.

> The threshold inquiry in effectiveness of counsel claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness if of arguable merit; for counsel cannot be found ineffective for failing to assert a meritless claim. Once this threshold is met

> we apply the reasonable basis test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine that there was no reasonable basis for counsel's chosen course then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. The burden of establishing counsel's ineffectiveness is on the [defendant] because counsel's stewardship of the trial is presumptively effective.

Commonwealth v. Wilson, 672 A.2d 293, 298 (Pa. 1996)(citation and quotation marks omitted), cert. denied, 519 U.S. 951 (1996). Prejudice is this context has been defined to mean appellant must establish that but for the arguably ineffective act or omission there is a reasonable probability the result at trial would have differed. **Commonwealth v. Crawley**, 663 A.2d 676, 679 (Pa. 1995), cert. denied, 517 U.S. 1212(1996). Where it is clear a

defendant has failed to meet the prejudice prong, the claim may be disposed on that basis alone, without a determination concerning the first two prongs. **Wilson, supra**. Counsel is deemed effective if any reasonable basis for his exists for his actions. **Commonwealth v. Douglas**, 645 A.2d 226, 231 (Pa. 1994).

With respect to appellant's claim that counsel should have presented a diminished capacity defense, we note counsel employed the defense of heat of passion at trial, in an effort to reduce the crime to voluntary manslaughter. Given the uncontested fact appellant shot the victim, this was hardly a poor strategy, one supported by many of the same facts advocated in favor of diminished capacity.

However, passion is inconsistent with diminished capacity to the jury, he would have cut the legs from under his credibility arguing

a heat of passion defense. One cannot argue how appellant's mind was overcome with passion from the unfolding events, then argue with a straight face that appellant was, simultaneously, unable to intend the very consequences passion caused him to seek.

Appellant states "the thrust of this argument is that there was a factually supportable defense, which trial counsel failed to present to the jury." There is no requirement, however, that counsel present a factually supportable defense that undermines the validity of another valid defense. The law does not require counsel to be automatons, presenting everything "factually supportable," regardless of the fact this will cause the jury's total disbelief of everything. Accordingly, we conclude counsel had a reasonable basis to forego a diminished capacity defense.

Next, appellant argues counsel was

ineffective for failing to present evidence of his suicidal tendencies. Despite this contention, the record is replete with references to appellant's suicide attempts and suicidal inclinations. N.T., 1/16/98, at 590, 610, 617, 624, and 850. Appellant himself testified concerning his suicide attempts. N.T. 1/16/98, at 951. Therefore, appellant's claim is meritless.

Likewise, appellant's claim that counsel should have presented evidence that appellant had access to other firearms in August, 1997, lacks merit; such testimony was presented. N.T., 1/16/98, at 862-64.

Appellant further contends trial counsel should have moved for a mistrial due to the interaction between a juror and the victim's sister. However, there is nothing of record referencing this alleged interaction. We cannot consider matters not of record.

Commonwealth v. Bracalielly, 658 A.2d 755, 763 (Pa. 1995).

Finally, appellant argues the trial court abused its discretion in denying his motion for a mistrial where a juror observed him in custody during trial. Primarily, appellant alleges the juror saw him in prison garb while waiting for an elevator. The trial court did not *voir dire* the juror. In a similar case, this Court found:

> As a general rule, defendants should not be subjected to physical restraint while in court unless the trial judge has found such restraint necessary to maintain order. Nevertheless, it is clear that a brief, accidental sighting of a defendant in custodial trappings, without more, is not so inherently prejudicial as to significantly impair the presumption of innocence to which a defendant is entitled ... The court concluded that under these circumstances, a brief sighting of the defendant in handcuffs was not grounds for a mistrial.

Commonwealth v. Johnson, 500 A.2d 173,

175 (Pa.Super. 1985)(citations and quotation marks omitted). Therefore, the trial court properly determined the juror's observation was not grounds for a mistrial.

Having determined appellant is not entitled to relief on the claims presented, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Dated: October 15, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARRY BUTRY,	:	CIVIL ACTION
Petitioner	:	No. 3:CV-01-0834
	:	
v.	:	(Judge Munley)
	:	
SUPERINTENDANT,	:	
SCI -COAL	:	
TOWNSHIP, et al.,	:	
Respondent	:	

ORDER

AND NOW, to wit, this 13th day of May, 2003, consistent with the foregoing Memorandum, **IT IS HEREBY ORDERED** that:

1. The Petition for Writ of Habeas Corpus is DENIED;

2. The Clerk of Courts is directed to CLOSE this case.

3. There is no basis for the issuance of a Certificate of Appealability.

BY THE COURT:

s/James M. Munley

JUDGE JAMES M. MUNLEY

United States District Court

Filed: May 13, 2003